Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

GROSS SEED COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress in enacting the Transportation Equity Act for the 21st Century had a strong basis in evidence to authorize and require a 50-state program of racial and gender preferences as a putative remedy for discrimination in public contracting?

2. Whether the Disadvantaged Business Enterprise (DBE) program of the United States Department of Transportation (DOT)—which discriminates on the basis of race and gender in connection with the federal funding of highway construction contracts let by states—is narrowly tailored to further a compelling interest?

3. Whether Nebraska's DBE program, which was required by DOT's DBE regulations and approved by DOT, satisfies strict scrutiny?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Gross Seed Company was the plaintiff-appellant in the court below. Respondents Nebraska Department of Roads; John L. Craig, in his capacity as the Director of the Nebraska Department of Roads; United States Department of Transportation; Federal Highway Administration; and United States, were the defendants-appellees in the court below.

Petitioner has no parent corporations, and no publicly held company owns 10% or more of its stock.

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---

PETITION FOR A WRIT OF CERTIORARI

Gross Seed Company respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 345 F.3d 964 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the District of Nebraska is unreported and reproduced at App. 15a.

JURISDICTION

The judgment of the Eighth Circuit was entered on October 6, 2003. App. 1a. The jurisdiction of the Eighth Circuit was

based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides: "[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1.

Section 1101(b) of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, 113 (1998) provides:

> (1) General Rule.—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.
>
> (2) Definitions.—In this subsection, the following definitions apply:
>
> * * * *
>
> (B) Socially and Economically Disadvantaged Individuals.—The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

The most relevant provisions of 49 C.F.R. Part 26 are as follows:

49 C.F.R. § 26.5 provides in part:

Disadvantaged business enterprise or *DBE* means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

* * * *

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

49 C.F.R. § 26.21 provides in part:

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA [Federal Highway Administration] recipients receiving funds authorized by a statute to which this part applies;

* * * *

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part.

* * * *

49 C.F.R. § 26.41 provides in part:

> (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
>
> * * * *

49 C.F.R. § 26.67 provides in part:

> (a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals.
>
> * * * *

INTRODUCTION

This case presents the same important questions that this Court granted certiorari to resolve in *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001) (per curiam), but without the vehicle problems that ultimately led the Court in that case to dismiss the writ as improvidently granted.

After *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), held that all government-imposed racial classifications are subject to strict scrutiny, and *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000) (per curiam), held that Adarand's equal protection challenge was not moot, this Court granted certiorari in *Adarand Constructors, Inc.* v. *Mineta*, *supra*, to consider the merits of Adarand's claims and answer "questions of fundamental national importance calling for final resolution by this Court." 534 U.S. at 110.

Those "questions of fundamental national importance" were whether the Disadvantaged Business Enterprise (DBE)

program of the United States Department of Transportation (DOT)—which openly discriminates on the basis of race and gender in connection with the federal funding of state highway projects—was narrowly tailored to serve a compelling governmental interest and whether the Tenth Circuit had misapplied the strict scrutiny standard. This Court did not resolve those questions, however, but instead dismissed the writ as improvidently granted after Adarand stated for the first time at the merits stage that it was not challenging "DOT's DBE program as it pertains to the use of federal funds for highway projects let by States." *Id.* at 107.

Like *Adarand*, this case involves an equal protection challenge to DOT's DBE program. But unlike Adarand, Gross Seed Company *is* challenging the program as it relates to the federal funding of state highway projects. The court below upheld the constitutionality of that program, both on its face and as implemented by the State of Nebraska, the state where Gross Seed does business, and Gross Seed seeks review of that judgment. Thus, this case affords the Court an opportunity to resolve the important questions that *Adarand* appeared, but in the end failed, to present.

The decision below also warrants review so that this Court can consider the Eighth Circuit's holding that the federal government can authorize or require Nebraska to implement racial preferences without showing that "the record before Congress included strong evidence of race discrimination in construction contracting *in* * * * *Nebraska*." App. 8a (emphasis in original). Under that holding, Congress can permit or even mandate racial preferences coast-to-coast in every state (and in even smaller jurisdictions) as a putative remedy for discrimination even if Congress had no evidence that discrimination is a problem in a particular state or all 50 states.

Given the dismissal of the writ in *Adarand* v. *Mineta*, the fundamental national importance of the questions presented

here, the errors of the Eighth Circuit in this case, and the inconsistency between the decision below and *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001), this Court's review of the decision below is warranted.

STATEMENT OF THE CASE

TEA-21 and DOT's DBE Regulations. The Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) ("TEA-21"), provides that "not less than 10 percent" of the funds provided by the federal government to the states for highway construction projects shall be set aside for small businesses owned and controlled by "socially and economically disadvantaged individuals." *Id.* § 1101(b), 112 Stat. at 113.

TEA-21 further provides that "[t]he term 'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) * * *; except that women shall be presumed to be socially and economically disadvantaged individuals." *Id.* § 1101(b)(2)(B), 112 Stat. at 113.

In enacting TEA-21, Congress made no findings with respect to the purpose of the 10% set aside in section 1101(b) or the evidence of which Congress was cognizant that supported the use of racial and gender preferences.

DOT promulgated regulations implementing TEA-21 in 1999. *See* 49 C.F.R. Part 26. Under these regulations, members of five racial and ethnic groups—"Black Americans," "Hispanic Americans," "Native Americans," "Asian-Pacific Americans," and "Subcontinent Asian Americans," including more than three dozen subgroups—and all women are presumed to be socially and economically disadvantaged and hence eligible for TEA-21's 10% set aside. *Id.* § 26.5.

To receive federal-aid highway funds, a state must have a DBE program approved by the DOT. *See id.* § 26.21(a) ("If

you are [a recipient of DOT assistance] and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part"); *id.* § 26.21(c) ("You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part."). In its DBE program, a state must presume that members of the five groups listed in 49 C.F.R. § 26.5 and women are disadvantaged. *See id.* § 26.67(a)(1) ("You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals.").

The presumption of disadvantage is rebutted for an individual who has a personal net worth exceeding $750,000, *see id.* § 26.67(b)(1), not counting the individual's ownership interest in a DBE firm or equity in his or her primary residence, *see id.* § 26.5. If a state has a "reasonable basis" to believe that a presumptively disadvantaged individual is not, in fact, socially or economically disadvantaged, the state "may" start a proceeding "to determine whether the presumption should be regarded as rebutted as to that individual." *Id.* § 26.67(b)(2). The state shoulders the burden of proof in such a proceeding. *See id.* § 26.67(b)(3).

As part of its DBE program, a state must "set an overall goal for DBE participation in [its] DOT-assisted contracts," *id.* § 26.45(a)(1), and must submit its overall goal to DOT for review on an annual basis, *see id.* § 26.45(f)(1). After review, DOT may adjust the state's overall goal or require that the state do so. *See id.* § 26.45(f)(4). When a state submits its overall goal to DOT it must also project the portion of the goal it expects to meet through race- and gender-neutral means and its basis for that projection; this projection is "subject to approval" by DOT. *Id.* § 26.51(c).

A state must meet "the maximum feasible portion of [its] overall goal by using race-neutral means of facilitating DBE participation." *Id.* § 26.51(a). Although "quotas" are not permitted, *id.* § 26.43(a), states "may use set-asides" when "limited and extreme" circumstances warrant, *id.* § 26.43(b). *See also* App. 10a ("If race-neutral means are projected to fall short of achieving the overall goal, the State must give preference to firms it has certified as DBEs."). Nothing in DOT's DBE regulations, however, requires a state to possess or develop evidence of present or past discrimination within its borders or provide such evidence to DOT.

A state that fails to comply with "any requirement" of 49 C.F.R. Part 26 is "subject to formal enforcement action," including the "suspension or termination of Federal funds or refusal to approve projects, grants or contracts" and other "[p]rogram sanctions." *Id.* § 26.101(a). Furthermore, a state that does not have an approved DBE program or an overall goal or that fails to implement its DBE program in good faith is "in noncompliance with this part." *Id.* § 26.47(b).

Nebraska's DBE Program. The Nebraska Department of Roads (NDOR) is a recipient of federal-aid highway funds authorized by TEA-21. For Fiscal Year 2000, NDOR adopted an overall goal of 11% participation by DBEs in DOT-assisted contracts. NDOR projected that 2.33% DBE participation would be met through race- and gender-neutral means and that 8.67% DBE participation would be met through race- and gender-based means. DOT approved NDOR's program. App. 18a.

For Fiscal Year 2001, NDOR set an overall goal of 9.95% DBE participation and projected that race- and gender-neutral means would achieve 5.13% DBE participation, while 4.82% DBE participation would be met through race- and gender-conscious means. NDOR also required prime contractors to make a good faith effort to subcontract a set

portion of each contract amount to DBEs. DOT granted its approval. App. 14a, 18a.

Gross Seed Company. Gross Seed is a contractor specializing in landscaping and seeding. John C. Gross, a white male, owns 50% of Gross Seed's issued stock. Peggy L. Gross, his wife, owns the other 50%. John Gross is Gross Seed's president, and he controls and manages the company. Peggy Gross is a director of Gross Seed and its secretary and treasurer. App. 16a, 20a; NDOR C.A. App. A95, A145, A148, A157; Trial Tr. 1369-70; Second Am. Compl. ¶ 5.

Gross Seed regularly bids on and performs federally-assisted highway construction contracts in Nebraska, both as a prime contractor and a subcontractor. App. 3a, 16a; Trial Tr. 1370. Gross Seed does not qualify as a socially and economically disadvantaged business under TEA-21, its implementing regulations, or NDOR's DBE program. App. 20a; *see* 49 C.F.R. § 26.5 (for a corporation to be a DBE, 51% of its stock must be "owned by one or more individuals who are both socially and economically disadvantaged").

In January 2000, NDOR's DOT-approved DBE program caused Gross Seed to lose a subcontract to perform seeding work for which it was the low bidder. For this particular federal-aid highway project ("the Brownlee Spur project"), NDOR set a DBE participation goal of 6% of the prime contract amount. Although Gross Seed submitted the low bid of $255,771, the prime contractor awarded the subcontract to a DBE that bid $322,530. Trial Tr. 1334-47; Second Am. Compl. ¶ 50. The prime contractor did so because "[t]hat was the only option we had on this particular project to meet the DBE goal." Trial Tr. 1347. The prime contractor testified that, had there not been a DBE goal on the Brownlee Spur project, "[w]e would have used Gross Seed for the seeding items, low bidder." *Id.*

Gross Seed brought this suit against NDOR challenging the constitutionality under the Fifth and Fourteenth Amendments

of TEA-21, 49 C.F.R. Part 26, and NDOR's DBE program, both facially and as applied to Gross Seed. The federal government subsequently intervened in the case. App. 1a-2a; Second Am. Compl. ¶¶ 1, 6-9, 53-63.

During discovery, NDOR admitted that Nebraska lacks evidence of governmental discrimination against DBEs in the state in recent years. Specifically, NDOR admitted that Nebraska "has no evidence of deliberate exclusion of Nebraska DBEs in NDOR contracting [in the last] six years"; "cannot identify any NDOR highway contract awarded in the last six years in which Nebraska discriminated against Nebraska DBEs"; "cannot identify any NDOR highway contracting procedure in the last six years in which Nebraska discriminated against Nebraska DBEs"; "cannot identify any NDOR contracting personnel who have, in the last six years, discriminated against Nebraska DBEs"; and "has not taken any disciplinary action against any NDOR personnel for discrimination against Nebraska DBEs in state contracting in the last six years." NDOR also admitted that "Nebraska has never taken any action punishing any non-DBE for discrimination against a DBE in connection with any highway contract in [the] last six years." Defs.' Resp. to Plfs.' First Request for Admissions 1-2. *See also* Gross Seed C.A. App. 73.

Decisions Below. Following a seven-day bench trial, the District Court issued an opinion concluding that "TEA-21 and 49 C.F.R. Part 26 meet the requirements of strict scrutiny and are, therefore, constitutional." App. 27a. The court said that "[h]aving examined the legislative history and the regulations adopted by the Department of Transportation, the Court is satisfied that the evidence establishes a compelling interest for the adoption of TEA-21 and * * * 49 C.F.R. Part 26." App. 26a. The court also rejected Gross Seed's contention that NDOR was required to "independently establish that a compelling interest exists *in Nebraska*." *Id.* (emphasis added). The District Court therefore entered judgment dis-

missing Gross Seed's second amended complaint. *See* Order & Judgment (May 6, 2002). The court also denied Gross Seed's subsequent motion to amend findings, or in the alternative, for new trial. *See* Order (July 9, 2002).

The Eighth Circuit affirmed in an opinion that also decided a separate case involving a challenge to DOT's DBE program as implemented by the State of Minnesota. App. 1a.

The Eighth Circuit began by noting that, because DOT's DBE program "employs a race-based rebuttable presumption and authorizes the use of race-conscious remedial measures," the program is subject to strict scrutiny and hence must be narrowly tailored to further a compelling government interest. App. 6a. Following the lead the Tenth Circuit took in its last *Adarand* decision, *see Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand II*"), *cert. granted*, 532 U.S. 941, *writ dismissed*, 534 U.S. 103 (2001), the Eighth Circuit determined that the government had identified a compelling interest in this case:

> As the Tenth Circuit said in *Adarand II*, "we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." 228 F.3d at 1165. [App. 6a.]

The Eighth Circuit went on to say that "[i]n addition to identifying a compelling government interest, the government must demonstrate a 'strong basis in the evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." App. 6a. The Eighth Circuit then proceeded to "conclude that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand II*, 228 F.3d at 1167-76." App. 7a. The Eighth Circuit stated that, "[a]s the Tenth Circuit's

analysis demonstrates, Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry." App. 7a.

Having rejected Gross Seed's claim that DOT's DBE program lacked a compelling interest on its face, the Eighth Circuit next rejected Gross Seed's as applied challenge. In so doing, the court held that the government was not required to have specific evidence of discrimination *in Nebraska* or any other state. The court said:

> If Congress * * * acted for a proper purpose and with a strong basis in evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject [Gross Seed's] contention that [its] facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting *in* * * * *Nebraska*. [App. 8a (emphasis in original).]

On the issue of narrow tailoring, the Eighth Circuit held that DOT's DBE program was narrowly tailored, both on its face and as implemented by Nebraska. The court stated that the program was narrowly tailored as a facial matter because DOT's regulations (1) "place strong emphasis" on race-neutral means; (2) have "substantial flexibility" due to available waivers and exemptions and other program limits; (3) "tie[ ] the goals for DBE participation to the relevant labor markets"; and (4) make social and economic disadvantage, rather than race, the "determinative factor" in the program. App. 11a, 12a.

The Eighth Circuit also held that Gross Seed "failed to prove that the revised DBE program is not narrowly tailored as applied in Nebraska." App. 14a. The court, in a cursory paragraph, stated that NDOR's overall goal for DBE partici-

pation and its projection of the percentage of the goal that would be achieved by race- and gender-based means were based on the recommendation of MGT of America, Inc., which had performed "availability and capability studies of DBE firms in the Nebraska highway construction market." App. 14a.

REASONS FOR GRANTING THE WRIT

I. AS DID *ADARAND*, THIS CASE PRESENTS QUESTIONS OF FUNDAMENTAL NATIONAL IMPORTANCE.

Although this Court three times granted certiorari and issued opinions in the *Adarand* case, the Court never determined whether DOT's DBE program, which openly discriminates on the basis of race and gender, satisfies strict scrutiny, thus leaving that important question unresolved. This case is like *Adarand* in that it involves the same federal statutory and regulatory scheme, the same legal issues, and the same relevant fact pattern (Gross Seed, like Adarand, is a non-minority contractor that lost work due to a racial preference). Unlike *Adarand*, however, this case does not have the vehicle problems that led to the dismissal of the writ in that case. Thus, with this case the Court can do what it granted certiorari to do in *Adarand* v. *Mineta*—determine whether DOT's DBE program satisfies strict scrutiny.

In its first *Adarand* opinion, this Court, reversing the Tenth Circuit, clarified the standard of review applicable to Adarand's challenge and held that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). The Court then remanded for the application of strict scrutiny to DOT's DBE program.

Five years later, in *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000) (per curiam), this Court—again reversing the Tenth Circuit—held that the case was not mooted by

Colorado's certification of Adarand as a DBE. Finding that Adarand's "cause of action remains alive," *id.* at 224, the Court once again remanded for further proceedings.

Finally, after the Tenth Circuit upheld DOT's DBE program, *see Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000), this Court granted certiorari to review the Tenth Circuit's judgment and consider the merits of Adarand's equal protection challenge. *See Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001) (per curiam). The Court granted certiorari on these two questions:

> 1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination?
>
> 2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest? [*Id.* at 107 n.1.]

Before it could reach those questions, however, this Court dismissed the writ as improvidently granted. The Court did so after Adarand announced for the first time at the merits stage of the case that it was "not challenging any part of DOT's state and local procurement program." *Id.* at 108. Although "[i]t appeared at the certiorari stage that petitioner was indeed challenging," that program, *id.* at 107, Adarand's merits brief made clear that Adarand was "challenging only the statutes and regulations that pertain to the DOT's direct procurement of highway construction on federal lands." *Id.* at 108. The Court noted that "while procurement by States and localities is governed by regulations issued by the Secretary of Transportation under TEA-21, direct federal procurement is governed by the Small Business Act * * * and the regulations promulgated thereunder." *Id.* The Court "thus decline[d] to reach the merits of petitioner's present challenge." *Id.* at 110.

In dismissing the writ, this Court in *Adarand* v. *Mineta* acknowledged that that case had appeared to "present[ ] questions of fundamental national importance calling for final resolution by this Court." *Id.* The difference between this case and *Adarand* is that those "questions of fundamental national importance" actually are presented here. As in *Adarand*, Gross Seed challenges DOT's DBE program on equal protection grounds. But unlike that case, Gross Seed *is* challenging "the constitutionality of the DOT's DBE program as it pertains to the use of federal funds for highway projects let by States and localities." *Id.* at 107. Thus, this case is what *Adarand* v. *Mineta* "appeared at the certiorari stage" to be. *Id.*

Furthermore, the Eighth Circuit held in this case that in enacting racial preferences "Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary *for the reasons stated by the Tenth Circuit in Adarand II*, 228 F.3d at 1167-76." App. 7a (emphasis added). Thus, one of the key holdings of the Tenth Circuit in *Adarand* that the Court was set to review in *Adarand* v. *Mineta* is again directly at issue here. And, as explained below, *see* Part II-A, *infra*, that holding by the Tenth Circuit was incorrect.

This Court in *Adarand* authored a trilogy without a final chapter. Until this Court reaches the merits of an equal protection challenge to the DOT's DBE program, the approach that lower courts should take in such cases will remain unsettled. The Court should grant review in this case and determine the constitutionality of the program on its face and as jointly implemented by the federal government and the State of Nebraska.

This Court recently denied certiorari (over the dissent of Justice Scalia, whose opinion the Chief Justice joined) in *Concrete Works of Colorado, Inc.* v. *City and County of Denver, Colorado*, 540 U.S. ___ (2003). That case involved

a racial preference in public contracting enacted by Denver on its own and without federal involvement. This case, unlike *Concrete Works*, involves an intergovernmental program authorized by Congress, required and approved by DOT, and implemented by Nebraska. This Court has never decided on the merits an equal protection challenge to such a program. *Compare City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989) (holding unconstitutional Richmond's 30% set-aside program for minority subcontractors) with *Adarand* v. *Mineta* (dismissing the writ in challenge to DOT DBE program).

II. GROSS SEED WAS SUBJECTED TO UNCONSTITUTIONAL DISCRIMINATION BY THE FEDERAL GOVERNMENT AND THE STATE OF NEBRASKA.

A. The Eighth Circuit Erred In Adopting The Tenth Circuit's Erroneous Conclusion In *Adarand* That Congress Had A Strong Evidentiary Basis For Enacting Racial Preferences.

Remedying the effects of past or present discrimination is a compelling interest that "may in a proper case justify a government's use of racial distinctions." *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996). *See Adarand*, 515 U.S. at 237. But "[r]acial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. Therefore, before the government can enact a racial preference as a remedy for discrimination, it must have "a 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Id.* (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality)). *Accord Shaw* v. *Hunt*, 517 U.S. at 910.

In this case, the Eighth Circuit's conclusion that Congress had the requisite strong basis in evidence to enact racial preferences was based entirely on the Tenth Circuit's opinion in *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th

Cir. 2000), *cert. granted*, 532 U.S. 941, *writ dismissed*, 534 U.S. 103 (2001). As the Eighth Circuit stated:

> We agree that we must take a hard look at the evidence, and we have done so. We conclude that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary *for the reasons stated by the Tenth Circuit in Adarand II*, 228 F.3d at 1167-76. [App. 7a (emphasis added).]

There, the Tenth Circuit had said that Congress' strong evidentiary basis was contained "particularly" (228 F.3d at 1176) in a document styled *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (1996). The Appendix—which was prepared by the Department of Justice in the wake of this Court's first opinion in *Adarand* with an eye toward the litigation to follow from the Court's 1995 remand—purports "to summarize the evidence that has been assembled to date on the compelling interest question" and "the legislative record that underpins the acts of Congress that authorize affirmative action measures in procurement." *Id.* at 26,050. Relying heavily on the Appendix, *see* 228 F.3d at 1167-76, the Tenth Circuit deemed Congress to have made a "finding" that "racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy." *Id.* at 1167.

The Appendix and the congressional materials cited therein do not provide a strong basis in evidence supporting the 10% set aside for minority group members and women in TEA-21. The Appendix consists mainly of citations to congressional reports and hearings and the statements of individual Members of Congress. But conclusory statements offered by legislators "are of little probative value in establishing identified discrimination in [a particular] construction industry." *Croson*, 488 U.S. at 500. And the reports and hear-

ings cited in the Appendix, some of which are now 25 years old, are far too general to support the enactment of a nationwide program applicable to nearly every racial and ethnic minority group and all women—indeed, a program apparently applicable to everyone except white males—and in every corner of the country. *See Shaw* v. *Hunt*, 517 U.S. at 909 ("A generalized assertion of past discrimination in a particular industry or region is not adequate" to justify a racial preference); *Croson*, 488 U.S. at 498. The reports and hearings do not provide evidence of discrimination in every sector of the construction industry, in every geographic market, against every racial group covered by the DBE program. Thus, TEA-21's 10% set aside "cannot in any realistic sense be tied to any injury suffered by anyone." *Id.* at 499.

The Appendix also cites so-called disparity studies commissioned by various state and local governments that claim to prove through statistical analysis that minority contractors endure discrimination. *See id.* at 509 ("Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.") (plurality opinion). All too often, however, disparity studies are badly flawed. *See* U.S. General Accounting Office, *Disadvantaged Business Enterprises* 29 (June 2001) ("[O]ur review of the 14 disparity studies [specific to transportation contracts] found that the limited data used to calculate disparities, compounded by methodological weaknesses, create uncertainties about the studies' findings. * * * While not all studies suffered from every problem, each suffered from enough problems to make its findings questionable."). And even if all of the studies in the Appendix were valid, proof of discrimination in isolated or scattered jurisdictions does not provide a sufficient basis to authorize or require each and

every state to implement racial and gender preferences on a coast-to-coast basis. *See Croson*, 488 U.S. at 505 (rejecting the suggestion "that findings of discrimination may be 'shared' from jurisdiction to jurisdiction * * *. We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another."). The Appendix does not cite a disparity study that is *national* in scope, as there is no national market for most government contracts.

On top of all this, there has been no showing that when Congress enacted TEA-21 it actually relied upon, or even considered, the Appendix materials. TEA-21 itself contains no relevant findings, and it is not clear what evidence, if any, Congress relied upon in enacting the race- and gender-based 10% set aside in the statute. As nine Members of the House Committee on Transportation and Infrastructure, the committee out of which TEA-21 was reported, noted:

> No evidence has been presented to this Committee that actual discrimination has occurred within the transportation construction industry. * * * No evidence has been presented justifying the use of the program on a nationwide basis. No statistical evaluations have been presented justifying the use of the program in any given market. [H.R. Rep. No. 105-467, at 500 (1998) (additional views).]

B. The Eighth Circuit Erred In Permitting Racial Preferences In Nebraska Without Requiring Strong Evidence Of Discrimination In Nebraska.

Having found that Congress had a strong basis in evidence "nationwide," the Eighth Circuit held that Congress could authorize or require racial preferences in each of the 50 states "even if the evidence did not come from or apply to every State or locale in the Nation." App. 8a. Thus, in upholding the DOT DBE program as implemented by Nebraska the court required no proof that "the record before Congress in-

cluded strong evidence of discrimination in construction contracting *in* * * * *Nebraska*." App. 8a (emphasis in original).

That holding cannot be squared with *Croson*, which struck down the City of Richmond's 30% set aside for minority subcontractors. Defending the need for its program, Richmond pointed to congressional findings "that there had been nationwide discrimination in the construction industry." *Croson*, 488 U.S. at 504. But this Court rejected that defense and said that "[t]he probative value of these findings for demonstrating the existence of discrimination *in Richmond* is extremely limited." *Id.* (emphasis added).

If Nebraska had enacted a DBE program entirely on its own and without federal involvement (which it has not), there is no doubt that it would have had to muster strong evidence of discrimination *in Nebraska*. *See id.* at 504 (requiring "Richmond [to] identify the discrimination it seeks to remedy in its own jurisdiction"); *Concrete Works of Colo., Inc.* v. *City & County of Denver, Colo.*, 540 U.S. ___ (2003) (Slip Op. at 5) ("To be crystal clear: Denver *cannot* meet its burden without proving that there was pervasive racial discrimination in the *Denver* construction industry.") (Scalia, J., dissenting from the denial of certiorari) (second emphasis added). The decision below, however, holds that the evidence before Congress that discrimination is a *national* problem was sufficient to permit Congress to authorize or require every state to implement racial preferences—even though that very same evidence would not be enough for a state to enact a non-federal program of its own. This is bootstrapping. *Cf. Croson*, 488 U.S. at 518 ("The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me") (Kennedy, J., concurring in part and concurring in the judgment).

Here, however, the division head of NDOR's construction office that administers NDOR's construction contracts testified that he was not able to identify any instance in which Nebraska or NDOR had discriminated against Nebraska DBEs. *See* Trial Tr. 935. Nor could he identify any instance in which a prime contractor had discriminated against a subcontractor in Nebraska on the basis of race or gender. *See id.* And as noted above, NDOR has admitted in this case that it is not aware of any governmental discrimination against DBEs in recent years. *See supra* at 10-11 (citing Defs.' Resp. to Plfs.' First Request for Admissions 1-2).

C. The Eighth Circuit Erred In Finding The DBE Program Narrowly Tailored As Applied In Nebraska.

The Eighth Circuit held in this case that Gross Seed "failed to prove that the revised DBE program is not narrowly tailored as applied in Nebraska." App. 14a. Although the legal principle on which the court based that holding is unclear from the single paragraph the court wrote on the subject, the court placed great weight on the fact that for Fiscal Year 2001 NDOR had set its overall goal for DBE participation and its projection of the percentage of DBE participation achievable through race- and gender-neutral means based on the recommendations of MGT of America, Inc., which NDOR had commissioned to study the "availability and capability" of DBEs in Nebraska. App. 14a.

Unlike a disparity study, the study MGT performed was not intended to, and did not purport to, prove discrimination against DBEs. *See* Trial Tr. 954 (MGT did not "look for specific instances of discrimination or discrimination at all"); *id.* at 1156 (MGT's study did not conclude "that there is a disparity in the award of NDOR's subcontracts between DBEs and non-DBEs"). Instead, MGT's assignment was to assess DBE "availability and capability." (In fact, however, MGT did not measure DBE capacity. *See id.* at 1152.) What MGT found was "an *overutilization* of DBE subcontractors"

and "an *overutilization* of DBEs" when DBE prime contractors and subcontractors are combined. *Id.* at 1157 (emphases added). MGT did find an underutilization of DBE prime contractors, but one cannot infer discrimination from that finding, as MGT itself did not. *See id.* at 1156 (MGT did not conclude that "the reason for that underutilization of DBE prime contractors was due to discrimination").

Accordingly, that NDOR relied upon the work of MGT does not demonstrate that the Nebraska DBE program is narrowly tailored. Because MGT failed to identify the scope of the problem (if any) in Nebraska, one cannot say that the racial and gender preferences used in Nebraska are narrowly tailored. *Cf. Croson*, 488 U.S. at 507 ("[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.").

III. THE EIGHTH CIRCUIT'S DECISION IN THIS CASE IS INCONSISTENT WITH THE FEDERAL CIRCUIT'S *ROTHE* DECISION.

The decision below is at odds with *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001). *Rothe*, like this case, involved a Fifth Amendment challenge to a federal racial contracting preference ("the 1207 program"). And like TEA-21, the statutes creating the 1207 program incorporated the Small Business Act's race-based presumption that certain racial groups are disadvantaged. *See id.* at 1314 ("Under the Act, five groups (comprising thirty-seven subgroups) * * * are presumed to be socially and economically disadvantaged.").

The District Court in *Rothe* granted summary judgment in favor of the government, but the Federal Circuit held that the lower court had erred in "apply[ing] to federal programs a watered-down version of strict scrutiny." *Id.* at 1321. The Federal Circuit explained that "Congress is entitled to no deference in determining whether Congress had a compelling

interest in enacting the racial classification," but the District Court had failed to "undertake the same kind of detailed, skeptical, non-deferential analysis undertaken in *Croson*." *Id.* The Federal Circuit stated that judicial review of federal racial preferences "must not result in a lesser degree of scrutiny than was required by the Court in *Croson*. Strict scrutiny is a single standard." *Id.* at 1321-22. *See also id.* at 1329 ("Congress' decision to enact race-based legislation must be reviewed under the same, non-deferential analysis that applies to state or municipal racial classifications.").

The Federal Circuit further explained that the District Court had failed to determine, among other things, (1) "whether evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to *all five* purportedly disadvantaged racial groups included under the 1207 program"; (2) "whether discriminatory conduct or effects were experienced in the *specific industry*" at issue in that case (i.e., "business services" or "computer maintenance and repair services"); and (3) "whether the evidence before it is sufficiently *timely* * * * to properly support the program's constitutionality," since "much of the evidence referenced by the district court was more than a decade old by the time of the 1207 program's reauthorization in 1992." *Id.* at 1330 (emphases added). The Federal Circuit insisted that these determinations be made because of *Croson*'s admonition that "[p]roper findings * * * are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." 488 U.S. at 510 (plurality opinion). *See Rothe*, 262 F.3d at 1329.

The Eighth Circuit here committed the errors of the *Rothe* District Court. The court did not apply a detailed and skeptical *Croson* analysis to determine if Congress had a strong basis in evidence for the racial preference it enacted but instead applied a deferential, "watered-down version of strict scrutiny." If Nebraska had enacted a state-wide DBE program based on the evidence before Congress, that pro-

gram would surely be unconstitutional under *Croson*. But the Eighth Circuit held that the same evidence allows Congress to authorize or require Nebraska to adopt a DBE program. Thus, the court below watered down *Croson* for its review of a federal program implemented by a specific state.

Nor did the Eighth Circuit make (or require the District Court to make) any of the determinations upon which the Federal Circuit insisted. Neither of the courts below determined (1) whether the evidence before Congress justified remedial preferences for Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent Asian Americans (to say nothing of the nearly 40 subgroups listed in 49 C.F.R. § 26.5)—*and women*, who are also presumed to be disadvantaged; (2) whether discrimination exists in the highway landscaping or seeding businesses; or (3) whether the congressional hearings and reports cited in the Appendix—some of which date as far back as the 1970s—remain probative of discrimination today. Thus, it is clear that the Federal Circuit's application of strict scrutiny to federal racial contracting preferences is much more strict (and appropriately so) than that applied by the Eighth Circuit in this case.

Because the Eighth Circuit's decision in this case is inconsistent with *Rothe*, this Court's review of the decision below is warranted. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED.

This case is perfectly suited to resolve the important constitutional issues raised by Gross Seed.

First, this case comes to the Court on fully developed factual record. The District Court conducted a seven-day bench

trial at which 11 witnesses were called and 174 exhibits introduced into evidence. App. 16a. Following the trial, the court issued an opinion identifying stipulated facts and controverted issues and setting forth the court's findings of fact and conclusions of law. App. 15a-27a.

Second, all of the necessary governmental actors are parties to this case. On the federal side, the United States Department of Transportation, its Federal Highway Administration, and the United States itself are respondents in this Court. On the state side, both the Nebraska Department of Roads and its Director are respondents. *See supra* at ii.

Third, both courts below held that Gross Seed has Article III standing to seek forward-looking relief. *See* App. 21a ("[T]he plaintiff has standing to challenge TEA-21, its implementing regulations, and the Nebraska Department of Roads program adopted pursuant to the regulations."); App. 3a ("[T]he district court held that the subcontractor plaintiff has standing to assert its constitutional claims. We agree.") (footnote omitted). As the Eighth Circuit explained, Gross Seed has the necessary standing because "[t]he stipulated facts demonstrate that * * * Gross Seed ha[s] bid on federally assisted highway projects in the past, will continue to bid in the future, and suffer competitive harm when contracts are awarded to others under DOT's [DBE] program." *Id.* (citing *Adarand* v. *Peña*, 515 U.S. at 211-212).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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